

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

CAMILLE BYLO LEWIS,

Case No. 2:13-cv-00757-MMD-VCF

Petitioner,

ORDER

v.

STATE OF NEVADA,

Respondents.

This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner filed a counseled first amended petition. (Dkt. no. 7.) Before the Court is respondents' motion to dismiss the petition as untimely. (Dkt. no. 9.) Petitioner opposed (dkt. no. 12), and respondents replied (dkt. 13).

I. PROCEDURAL HISTORY AND BACKGROUND

On December 24, 2009, the State filed a criminal information charging petitioner Camille Bylo Lewis ("petitioner") and a co-defendant with one count grand larceny (exhibits to first amended petition, dkt. no. 7, Exh. 6).¹ The information contained a notice of the State's intent to sentence petitioner as a habitual offender pursuant to NRS 207.010. *Id.*

On April 16, 2010, petitioner was convicted of the count pursuant to a guilty plea. (Exh. 11.) She was adjudicated a habitual criminal and sentenced to ten to twenty-five years. (*Id.*)

¹All exhibits referenced in this order are exhibits to the amended petition, dkt. no. 7, and are found at dkt. no. 8.

1 Petitioner did not appeal. On June 8, 2010, petitioner filed a state postconviction
2 petition in state district court, and she filed a counseled supplemental petition on
3 October 5, 2010. (Exhs. 13, 20.) The district court denied the petition, the Nevada
4 Supreme Court affirmed the denial of the petition on July 26, 2012, and remittitur issued
5 on August 21, 2012. (Exhs. 24, 38, 39.)

6 On April 30, 2013, this Court received petitioner's *pro se*, unsigned document,
7 which she styled and entitled it as a "notice of appeal", stating "[petitioner] hereby
8 appeals to the United States District Court from the final judgment/order issued by the
9 Nevada Supreme Court entered the 26th day of July, 2012." (Dkt. no. 1-1.) As this Court
10 has explained previously, this action initially was docketed as a miscellaneous statutory
11 inquiry and was not brought up promptly for internal review following its filing. (See dkt.
12 no. 2.) When the Court recognized that the filing might be an attempt to initiate a federal
13 habeas action, the Court appointed the Federal Public Defender. (*Id.*) The Court
14 explicitly stated that it was expressing no opinion as to any possible bases for equitable
15 tolling. (*Id.*) Petitioner filed a counseled first amended petition on October 23, 2014.
16 (Dkt. no. 7.) Respondents have filed a motion to dismiss the amended petition as
17 untimely. (Dkt. no. 9.)

18 **II. LEGAL STANDARDS**

19 **A. AEDPA Statute of Limitations**

20 The Antiterrorism and Effective Death Penalty Act (AEDPA) went into effect on
21 April 24, 1996, and imposes a one-year statute of limitations on the filing of federal
22 habeas corpus petitions. 28 U.S.C. § 2244(d). The one-year time limitation can run from
23 the date on which a petitioner's judgment became final by conclusion of direct review, or
24 the expiration of the time for seeking direct review. 28 U.S.C. § 2244(d)(1)(A). Further, a
25 properly filed petition for state postconviction relief can toll the period of limitations. 28
26 U.S.C. § 2244(d)(2).

27 A petitioner may be entitled to equitable tolling if he or she can show "(1) that he
28 has been pursuing his right diligently, and that (2) some extraordinary circumstance

stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2009)(quoting prior authority). Equitable tolling is "unavailable in most cases," *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) and "the threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule," *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (quoting *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000)). The petitioner ultimately has the burden of proof on this "extraordinary exclusion." 292 F.3d at 1065. The petitioner accordingly must demonstrate a causal relationship between the extraordinary circumstance and the lateness of his or her filing. *E.g.*, *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). Ignorance of the one-year statute of limitations does not constitute an extraordinary circumstance that prevents a prisoner from making a timely filing. *See Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) ("a *pro se* petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling").

B. Relation Back

A new claim in an amended petition that is filed after the expiration of the one-year limitation period will be timely only if the new claim relates back to a claim in a timely-filed pleading under Rule 15(c) of the Federal Rules of Civil Procedure, on the basis that the claim arises out of "the same conduct, transaction or occurrence" as a claim in the timely pleading. *Mayle v. Felix*, 545 U.S. 644 (2005). In *Mayle*, the Supreme Court held that habeas claims in an amended petition do not arise out of "the same conduct, transaction or occurrence" as claims in the original petition merely because the claims all challenge the same trial, conviction or sentence. *Id.* at 655-64. Rather, under the construction of the rule approved in *Mayle*, Rule 15(c) permits relation back of habeas claims asserted in an amended petition "only when the claims added by amendment arise from the same core facts as the timely filed claims, and not when the new claims depend upon events separate in 'both time and type' from the originally raised episodes." *Id.* at 657. In this regard, the reviewing court looks to "the existence of

1 a common ‘core of operative facts’ uniting the original and newly asserted claims.” A
 2 claim that merely adds “a new legal theory tied to the same operative facts as those
 3 initially alleged” will relate back and be timely. *Id.* at 659 & n. 5.

4 **III. INSTANT PROCEEDINGS**

5 The parties do not dispute that petitioner had ninety-eight days of the limitations
 6 period remaining when the Court received the document entitled “notice of appeal” on
 7 April 30, 2013 (see dkt. no. 9 (setting forth statute of limitations calculations, at 3-4); dkt.
 8 no. 12 at 4; dkt. no. 13). Petitioner, through counsel, filed what has been referred to as a
 9 first amended petition on October 23, 2014 (dkt. no. 7); that petition was filed far beyond
 10 the limitations period, which expired on August 30, 2013. That petition is thus untimely
 11 under 28 U.S.C. § 2244(d)(1)(A) unless it relates back to a timely-filed petition.
 12 Respondents have moved to dismiss it on the basis that it does not. (Dkt. no. 9.)

13 **A. Relation Back**

14 First, petitioner argues that her *pro se* April 30, 2013, filing should be construed
 15 as a federal postconviction petition. Second, petitioner argues that the claim in the first
 16 amended petition relates back to that original petition and is therefore timely (dkt. no. 12
 17 at 4-8).

18 Petitioner contends that her *pro se* original filing should be liberally construed as
 19 a petition seeking habeas relief pursuant to 28 U.S.C. § 2254. *Id.* at 4. The handwritten
 20 filing was titled “Notice of Appeal” and stated, in its entirety:

21 Notice is hereby given that petitioner, Camille Bylo Lewis in the above
 22 named case, hereby appeals to the United States District Court from the
 23 final judgment order/issued by the Nevada Supreme Court entered the
 26th day of July, 2012.

24 (Dkt. no. 1-1.) Petitioner indicated that it was submitted in *propia persona* and printed
 25 her name but did not sign it. This document is insufficient to initiate an action in this
 26 Court. The Court should construe *pro se* filings more liberally, however, all petitioners,
 27 including *pro se* litigants, are required by Rule 2(c) of the Rules Governing Section 2254
 28 Cases to “specify all grounds for relief available to the petitioner” and “state facts

1 supporting each ground.” Petitioner’s filing sets forth no factual allegations, no claims, or
2 requests for relief whatsoever, and does not even identify the case about which she
3 sought to appeal.² Petitioners are also required to use the form required by this Court,
4 which is available to *pro se* litigants, including inmates. LSR 3-1. Petitioner further failed
5 to pay the filing fee or submit a completed application to proceed *in forma pauperis*.
6 LSRs 1-1, 1-2. The sole defendant she named was the State of Nevada, which is not
7 subject to suit in federal court due to state sovereign immunity.

8 Petitioner is correct that Rule 10(c) of the Federal Rules of Civil Procedure
9 permits incorporation of facts and claims from other documents attached to a habeas
10 petition. That is of no moment here, however, because petitioner did not attach any
11 state-court documents or any other documents to her original filing. This Court
12 concludes that petitioner’s original filing was insufficient to commence a habeas action
13 in this Court, and, therefore, the claim in the first amended petition cannot relate back to
14 the original filing. The so-called first amended petition is, therefore, untimely.

15 **B. Equitable Tolling**

16 Next, petitioner argues that, if the Court determines that the first filing cannot be
17 fairly construed as a habeas petition, petitioner should be entitled to equitable tolling
18 (Dkt. no. 12 at 8.) Petitioner argues that administrative error by this Court will unfairly
19 prejudice petitioner, absent equitable tolling. (Id. at 10.)

20 These arguments are unavailing. Petitioner’s original filing was timely, but she
21 failed to file a habeas petition, pay the filing fee, or submit a completed application to
22 proceed *in forma pauperis*. The sole defendant she named was an improper defendant.
23 It was unclear what type of case petitioner sought to initiate or what type of case served
24 as the basis of her “appeal,” and therefore, it was not docketed as a habeas action.
25 Petitioner then took no action whatsoever for fifteen (15) months. Pursuant to an

26
27 ²While not determinative, the Court notes that the Clerk of Courts — experienced
28 in handling *pro se* filings — did not discern that petitioner’s notice of appeal was an
attempt to initiate a habeas action, and therefore, did not docket it as such.

1 internal review, as well as research of the Nevada state-court docket, the Court then
2 determined that petitioner likely intended to seek federal habeas relief. This Court then
3 appointed counsel out of an abundance of caution.

4 Petitioner has utterly failed to demonstrate that she has been pursuing her rights
5 diligently, and that some extraordinary circumstance stood in her way and prevented
6 timely filing. *Sossa v. Diaz*, 729 F.3d 1225, 1229 (9th Cir. 2013), quoting *Ford v.*
7 *Gonzalez*, 683 F.3d 1230, 1237 (9th Cir. 2012). In *Sossa*, the Ninth Circuit stated that
8 “the requirement that extraordinary circumstances stood in [her] way suggests that an
9 external force must cause the untimeliness, rather than . . . merely oversight,
10 miscalculation or negligence on [the petitioner’s] part, all of which would preclude the
11 application of equitable tolling.” 729 F.3d at 1229 (internal quotations and citations
12 omitted). However, in that instance, the petitioner had sought and obtained extensions
13 of time to file an amended petition. *Id.* at 1231-1232. Here, petitioner was not
14 affirmatively misled by this Court in any manner. In fact, despite petitioner’s arguments,
15 petitioner’s case is more akin to the petitioner in *Raspberry v. Garcia*, where the Ninth
16 Circuit reaffirmed that district courts do not have an affirmative obligation to act as
17 counsel to a *pro se* litigant or to explain all nuances of federal habeas timelines and
18 procedure. 448 F.3d 1150, 1154 (9th Cir. 2006). The Court does not have an affirmative
19 duty to counsel petitioner or to do any research to ascertain the nature of petitioner’s
20 initial filing.

21 This Court agrees that petitioner has failed to meet the “very high” threshold
22 required to trigger equitable tolling, which must be adhered to, lest the exceptions
23 swallow the rule. *Miranda*, 292 F.3d at 1066; *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir.
24 2010). Petitioner does not identify any extraordinary circumstances that actually
25 prevented her from filing a timely federal habeas petition. The cause of petitioner’s
26 untimeliness is that she failed to file a federal habeas petition. Nor has petitioner
27 demonstrated diligent efforts on her part to file a federal habeas petition; she simply
28 mailed a one-page notice of appeal to this Court and took no further action whatsoever.

1 Equitable tolling is an extraordinary remedy, and this Court concludes that petitioner is
2 not entitled to such remedy.

3 In conclusion, petitioner's original filing in this case cannot be fairly construed as
4 a federal petition. Therefore, as the purported first amended petition was filed outside
5 the one-year limitations period, the claim in that petition does not relate back and is
6 untimely. Petitioner has failed to demonstrate any basis for equitable tolling or to excuse
7 the statute of limitations. Because the federal habeas petition was untimely filed, and
8 because petitioner is not entitled to statutory or equitable tolling, this action must be
9 dismissed.

10 **IV. CERTIFICATE OF APPEALABILITY**

11 In order to proceed with an appeal, petitioner must receive a certificate of
12 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v.*
13 *Ornoski*, 435 F.3d 946, 950-51 (9th Cir. 2006); see also *United States v. Mikels*, 236
14 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make "a substantial
15 showing of the denial of a constitutional right" to warrant a certificate of appealability.
16 *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The
17 petitioner must demonstrate that reasonable jurists would find the district court's
18 assessment of the constitutional claims debatable or wrong." *Id.* (quoting *Slack*, 529
19 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of
20 demonstrating that the issues are debatable among jurists of reason; that a court could
21 resolve the issues differently; or that the questions are adequate to deserve
22 encouragement to proceed further. *Id.* Pursuant to Rule 11(a) of the Rules Governing
23 Section 2254 and 2255 Cases, district courts are required to rule on the certificate of
24 appealability in the order disposing of a proceeding adversely to the petitioner or
25 movant, rather than waiting for a notice of appeal and request for certificate of
26 appealability to be filed. This Court has considered the issues raised by petitioner, with
27 respect to whether they satisfy the standard for issuance of a certificate of appealability,

28 ///

1 and determines that none meets the standard. The Court will therefore deny petitioner a
2 certificate of appealability.

3 **V. CONCLUSION**

4 It is therefore ordered that respondents' motion to dismiss the petition as
5 untimely (dkt. no. 9) is granted.

6 It is further ordered that petitioner's two unopposed motions for enlargement of
7 time (dkt. nos. 10 and 11) are both granted *nunc pro tunc*.

8 It is further ordered that a certificate of appealability is denied

9 DATED THIS 21st day of August 2015.

10
11 

12 MIRANDA M. DU
13 UNITED STATES DISTRICT JUDGE
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28